Nos. 93-1456; 93-1828

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

U.S. TERM LIMITS, INC., ARKANSANS FOR GOVERNMENTAL REFORM, INC., FRANK GILBERT, GREG RICE, LON SCHULTZ, and SPENCER PLUMLEY,
Petitioners,
vs.
RAY THORNTON, et al.,
Respondents.

WINSTON BRYANT, ATTORNEY GENERAL OF ARKANSAS,
Petitioner,
vs.
BOBBIE E. HILL, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF *AMICUS CURIAE* OF THE CALIFORNIA DEMOCRATIC PARTY, CONGRESSMAN HOWARD BERMAN, AND MARIE HARRIS IN SUPPORT OF RESPONDENTS

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INTRODUCTION

The litigants are addressing with skill and diligence the issues arising in this case under the Qualifications Clauses of the Constitution. We fear, however, that the litigants have given too little attention to the infringement of fundamental First and Fourteenth Amendment rights that would follow if this Court were to accept Petitioners' contention that Arkansas' Amendment 73 may be sustained as a mere ballot access restriction that imposes no new qualifications.

Amendment 73, working together with Arkansas' prohibition of write-in votes in primary elections, flatly denies to political parties the right to nominate the candidates of their choice, if party voters happen to favor an individual affected by Amendment 73. This denial occurs despite the state's claim that affected individuals are fully qualified to run for Congress. By taking away parties' freedom to select their own candidates, Arkansas drastically infringes rights of partisan association in plain contravention of this Court's recent decisions.

Amendment 73 is also unconstitutional because it excludes qualified candidates from the ballot, not because they are unable to demonstrate significant voter support, but because the state believes it is too probable that they will be elected. Petitioners and their supporters have made no serious attempt to defend Amendment 73's serious infringement of associational rights or its invidious favoritism.

We believe that the litigants, understandably preoccupied with the question *whether* Amendment 73 is a qualification, have thought too little about the constitutional issues presented in the event that Amendment 73 is deemed *not* to impose a qualification. The sole purpose of this amicus brief is to fill that gap.[1]

THE INTERESTS OF THE *AMICI CURIAE*

California Elections Code § 25003[2] limits the terms of representatives in Congress in a manner substantially identical to Arkansas Amendment 73.[3] House members are limited to three terms and Senate members to two terms. Write-in votes may be cast in the general election for individuals who have reached these limits. The *stare decisis* effect of this Court's decision in the present case will almost certainly determine whether the California term limits ever take effect.

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[1] Neither of the main briefs for Petitioners gives more than cursory attention to the First and Fourteenth Amendments. See Brief for Petitioners U.S. Term Limits, Inc., et al. at 22-23 n.27; Brief for the State Petitioner, at 33-34 n.38. Each relies on decisions upholding absolute term limits, a reliance that the next section of this brief demonstrates is invalid. The petition of the State Petitioner gave slightly more attention to the First and Fourteenth Amendments, though even there the discussion was confined to a single footnote. The arguments advanced in that footnote are addressed in Part III of this brief.

[2] This section is reprinted in Appendix A to this brief. It was adopted as initiative Proposition 164 in 1992.

[3] There are certain differences between the Arkansas and California provisions. For example, the Arkansas but not the California limits are "life-long." These differences have no bearing on the interests of the California Amici in this case, nor on the arguments tendered in this brief.

The California Democratic Party ("CDP") has a vital associational interest in assuring that its nominees for partisan office are those chosen by Democratic voters in primary elections open to all Democratic candidates qualified to hold the office in question.[4] The CDP also has a vital interest in assuring that the nominees chosen by its adherents in primary elections appear on the general election ballots, so that the CDP may compete fairly against opposing parties. Finally, the CDP has a vital interest in assuring that its primary elections result in a single, recognized Democratic candidate, behind whom party adherents can unite in the general election, so that the Democratic vote is not split among opposing candidates, each with a colorable claim to represent the CDP.[5]

All of these associational interests have been recognized by this Court as central to the functioning of the major political parties, yet each of these recognized interests will be vitiated if this Court reverses the decision of the Arkansas Supreme Court.

Howard Berman is a Democrat who represents California's 26th Congressional District (constituting roughly the eastern half of Los Angeles' San Fernando

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[4] By "all Democrats," we refer to Democrats who satisfy minimal durational requirements for affiliation with the CDP. *See* California Elections Code § 6401. Although such requirements might theoretically be vulnerable to attack under *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), the CDP does not object to them, because their effect is to strengthen the integrity of party primaries, in sharp contrast to ballot access term limits, which threaten to create havoc within the party. See Argument, Part II, *infra*.

[5] At its June 1993 Executive Board Meeting, the CDP formally declared its intention to open its primaries to all qualified Democrats regardless of their length of service in office. A copy of the resolution adopted on that occasion is set forth in Appendix B to this brief.

Valley) in the United States House of Representatives. Berman has represented this general area in the House since his original election in 1982. He is seeking re-election as a Democrat this year and, if he is successful, he anticipates doing the same at least through the 1998 election.[6] However, if California Elections Code § 25003 goes into effect, in 1998 Berman will be ineligible to appear on the ballot in either the primary or the general election. For him to seek the Democratic nomination in the primary, even as a write-in candidate, would be an exercise in futility, because under no circumstances could his name appear on the general election ballot as the Democratic Party candidate. California Elections Code § 25003 does not purport to disqualify Berman from seeking reelection in 1998, but will bar him from running under the auspices of the CDP and will force him to run *against* the Democratic candidate who is nominated at the primary. This will run directly contrary to his desire as a Democrat to help maintain unity within his party so that it may pursue its political goals. Accordingly, California Elections Code § 25003, if permitted to go into effect, will drastically impair Berman's right to associate with the CDP and with Democratic voters in the 26th Congressional District.

Marie Harris is a loyal and registered Democratic voter who resides in California's 26th Congressional District. Aware that "[t]here are few House members who have made such an imprint on legislation in so

[6] To facilitate exposition, this brief will assume that Berman is reelected in 1994 and 1996, and that he seeks reelection in 1998. Obviously, each of these assumptions is subject to numerous contingencies.

many areas as Howard Berman"[7] Harris voted for Berman in the June 1994 Democratic primary, intends to vote for Berman in the general election, and believes it is probable that she will continue to want to vote for Berman in both Democratic primaries and in general elections for the foreseeable future. Harris believes that Berman is peculiarly able to represent her and other San Fernando Valley voters, because although he is generally a mainstream congressional Democrat, he is willing and able to follow an independent course when his conscience or the needs of his district so dictate. For example, as described by T*he Almanac of American Politics*, he has worked successfully in concert with conservative Republicans such as Henry Hyde of Illinois and David Dreier of California to enact important legislation.[8] Harris believes that it is unlikely that any House candidate in the 26th District will combine Berman's legislative effectiveness and his particular independent policy stance. Yet, under California Elections Code § 25003, beginning in 1998, Harris will be presented with a dilemma: should she vote for Berman or for some other Democratic candidate who will not be barred from the ballot and may therefore have the better chance of defeating candidates of other parties? However Harris resolves this dilemma, her right to vote will be significantly impaired by reason of the state's discrimination against the candidate she favors. In addition, her right to associate with her fellow Democrats in the 26th Congressional District and with the CDP by nominating the individual of their choice as the candidate of the Democratic Party will be greatly impaired.

[7] Michael Barone & Grant Ujifusa, *The Almanac of American Politics 1994*, at 151 (1993).

[8] *Id.* at 151-52.

For the foregoing reasons, the associational rights of the CDP, Berman, and Harris (collectively referred to herein as "the California Amici") are at stake in the present case, as is Harris' right, under the Equal Protection Clause, to vote free of invidious discrimination by the state against the candidate she prefers.

SUMMARY OF ARGUMENT

1. The degree to which "ballot access term limits"[9] infringe associational and equal protection rights under the First and Fourteenth Amendments has been greatly underestimated because of an erroneous assumption that "ballot access term limits" can be equated with "absolute term limits" for First and Fourteenth Amendment purposes. States have considerable leeway under the First and Fourteenth Amendments to establish qualifications for public office. But the Qualifications Clauses deprive the states of this leeway in the case of elections for Congress. Thus, to avoid running afoul of the Qualification Clauses, it would have to be accepted that congressional ballot access term limits do not impose state-mandated congressional qualifications, but instead merely restrict ballot access for certain qualified congressional candidates. Congressional ballot access term limits would therefore have to undergo review, under the First and Fourteenth Amendments, as ballot exclusions aimed against fully qualified candidates for election to Congress.

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[9] By "ballot access term limits" we refer to provisions — such as Amendment 73 and California's Section 25003 — which deny access to the ballot for candidates who have served a specified number of terms, but which permit write-in votes for such candidates. By "absolute term limits" we refer to provisions that deny the ability of such candidates to be elected by any means.

2. Congressional ballot access term limits cannot withstand such an analysis. They constitute a major infringement of the associational rights of political parties and their adherents, vastly more disruptive than the infringements that were struck down by this Court in *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989). In those cases, the state made it more difficult for political parties to nominate the candidates of their choice, either by controlling who could vote in the parties' primaries or by preventing party committees from endorsing candidates. This Court responded by affirming that "[f]reedom of association means . . . that a political party has a right to . . . select a 'standard bearer who best represents the party's ideologies and preferences' ". [Citation omitted.] [Check form] Ballot access term limits even more seriously interfere with the parties' choice of standard bearer, by *prohibiting* the party from nominating the individual who may well best represent the party's ideology and preferences. But this is not the worst. Ballot access term limits impair the fundamental purpose of a party primary. The limits permit an individual who is barred from the ballot to run as a write-in candidate in the general election. If this option is exercised, party division and conflict are guaranteed. Party adherents are confronted with a grave dilemma. Who is the true standard bearer of the party — the candidate whose name is on the ballot as the winner of the party's primary, or the individual who has borne the party's standard successfully in previous elections, and must now run as a write-in? If, as is almost inevitable, party voters disagree on this question, the primary's purpose, which is to unite the party behind a single candidate, is destroyed by government fiat.

3. When this Court has reviewed ballot access restrictions, it has weighed the state's purposes against the imposition on a group of voters whose party or candidate is denied access. E.g., *Anderson v. Celebrezze*, 460 U.S. 780 (1983). But in each of these ballot access cases, the state's purposes — for example, minimizing voter confusion — have been directed toward facilitating the ability of the voters to elect the candidates of their choice. In contrast, ballot access term limits are intended to increase the likelihood that one set of qualified candidates defeat another set of qualified candidates. This Court has never suggested that it is proper for a state to deny ballot access to candidates on the ground that otherwise the voters are too likely to elect those candidates. For the state to regulate ballot access in order to control election results strikes at the heart of democracy and constitutes unusually invidious discrimination in violation of the Equal Protection Clause.

ARGUMENT

I.

IF AMENDMENT 73 SURVIVES REVIEW UNDER THE QUALIFICATIONS CLAUSES ON THE GROUND THAT IT DOES NOT ESTABLISH NEW QUALIFICATIONS FOR CONGRESS, THEN IT CANNOT BE EQUATED WITH ABSOLUTE TERM LIMITS FOR PURPOSES OF REVIEW UNDER THE FIRST AND FOURTEENTH AMENDMENTS.

Petitioners want to have it both ways. Lacking confidence that this Court will overthrow the extraordinarily well-established principle that the qualifications for Congress stated in the Constitution are exclusive,[10] they proclaim: Amendment 73 does *not* impose a qualification, it is merely a procedural measure, regulating access to the ballot.

Yet, when it is time to defend Amendment 73 under the First and Fourteenth Amendments, they assume that they can rely on the rationale of cases upholding absolute term limits, even though those limits unquestionably

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[10] This Amicus brief assumes the correctness of this principle. We anticipate that this issue will be presented adequately by the parties, and it is dealt with comprehensively in a forthcoming article by one of the signers of this brief. *See* Lowenstein, "Are Congressional Term Limits Constitutional?" 18 *Harvard Journal of Law & Public Policy* 1 (forthcoming 1994). Professor Lowenstein's article also deals with "ballot access term limits" (which he refers to as "quasi-term limits") under the First and Fourteenth Amendments.

did establish qualifications for state and local offices.[11]

Unquestionably, states have considerable leeway to establish qualifications for public office so far as the First and Fourteenth Amendments are concerned. A candidate's length of term in office could be such a qualification. It is therefore not surprising that judicial decisions to date have upheld absolute term limits for state office against attacks brought under these amendments. *See, e.g., Legislature v. Eu*, 816 P.2d 1309 (Cal. 1991), *cert denied*, 112 S.Ct. 1292 (1992). Were it not

[11] See, e.g., State of Arkansas' Petition in No. 93-1828, at 22-23 n.32 (string-citing cases upholding absolute term limits); Brief for Respondents Jay Dickey and Representative Tim Hutchinson Supporting Petitioners, at 26 n.6 and 36 n.14; Amicus Brief of United States Justice Foundation, at 12-13; Amicus Brief of Citizens for Term Limits and Pacific Legal Foundation, at 21-22; Amicus Brief of State of Washington, at 7-8 and 9 n.5.

It is not only the Petitioners who mistakenly assume that the state interests justifying absolute term limits can be applied to ballot access term limits, despite the fact that the latter ostensibly do not establish qualifications for office. Justice Cracraft, dissenting in the Arkansas Supreme Court, made the same error:

> In our deliberations, we have applied [the] balancing test to [the absolute term limits applicable to state officials in] Sections 1 and 2 of Amendment 73 and found that the state's interest in preventing the perceived evils outweighs the First and Fourteenth Amendment rights of state level candidates and voters therefor. In my opinion, since we have decided that Amendment 73's lifetime bar on state level incumbents passes Fourteenth Amendment muster, it must necessarily follow that the less stringent restrictions placed on members of Congress easily pass this same test.

(No. 93-1456, Pet. App. at 39a).

for the exclusionary effect of the congressional qualifications specified in the Constitution, states presumably would also have the power to set reasonable qualifications for Congress, subject to being overruled by Congress, under Article I, § 4 of the Constitution.

However, if ballot access term limits for Congress, like Arkansas' Amendment 73, are to be taken seriously as anything other than unconstitutional congressional qualifications, then the case must proceed under the assumption that the state regards term-limited individuals as fully qualified candidates. State interests that might justify qualifications for office cannot be tendered in support of Amendment 73 which, professedly, does not establish qualifications for office. To the contrary, state efforts to prevent *qualified* candidates from getting elected constitute a form of state favoritism that is highly suspect under both the First Amendment and the Equal Protection Clause.

It follows that decisions upholding absolute term limits, such as *Legislature v. Eu, supra*, are of no assistance to Petitioners in the present case. Either Amendment 73 establishes qualifications, in which case it violates the constitutional ban, or it does not, in which case it cannot be defended on the basis of the state's usual power to set qualifications for office. Rather, the state must carry the burden of justifying its harsh discrimination *among* qualified candidates.

II.

BALLOT ACCESS TERM LIMITS VIOLATE THE FREEDOM OF ASSOCIATION OF POLITICAL PARTIES AND THEIR ADHERENTS BECAUSE THEY (1) PROHIBIT A PARTY FROM NOMINATING A PARTY MEMBER WHO IS FULLY QUALIFIED FOR ELECTION TO CONGRESS, AND (2) MAKE IT VIRTUALLY IMPOSSIBLE FOR A PARTY TO UNIFY ITSELF AROUND A SINGLE CANDIDATE AT THE GENERAL ELECTION.

"The freedom of association protected by the First and Fourteenth Amendments includes partisan political organization." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986). The most important associational right of political parties and their adherents is their ability to choose freely their nominees for public office, because selecting candidates is "the 'basic function' " of parties. *Id.* at 216 (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58 (1973)). The parties' constitutional freedom to nominate the candidates they choose was reaffirmed in *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 224 (1989):

> Freedom of association means . . . that a political party has a right to . . . select a "standard bearer who best represents the party's ideologies and preferences." [Citation omitted.]

It would make little sense for parties to claim a right to nominate candidates who are unqualified to hold office. Therefore, an absolute term limit, which disqualifies individuals from holding office, does not

infringe parties' associational rights. But ballot access term limits do not purport to disqualify any individuals from being elected to and serving in Congress. Rather, they prohibit a party from nominating a term-limited candidate, despite the fact that the candidate is fully qualified to be elected, is a party member in good standing, and has repeatedly been elected to Congress as the candidate of the party in recent elections.

This is a far greater infringement on the associational freedom of parties to nominate candidates of their choice than was present in either *Tashjian* or *Eu*. In *Tashjian*, the Court held that a party had a right to permit non-party members to vote in its primaries. Three dissenting justices, who did not believe the party's rights extended this far, nevertheless agreed that "[t]he ability of the members of the Republican Party to select their own candidate . . . unquestionably implicates an associational freedom." 479 U.S. at 235-36 (Scalia, J., dissenting, joined by Rehnquist, C.J., and O'Connor, J.). Ballot access term limits directly interfere with the ability of members of parties to select their own candidates, and therefore violate the parties' associational rights under the views expressed by all members of the Court who reached the First Amendment question in *Tashjian*.[12]

In *Eu*, a statute prohibiting party committees from endorsing candidates in primary elections was struck down. The Court declared that depriving a party of the power to endorse candidates in its primaries "suffocates" the party's right of association. 489 U.S. at 224. If to prevent a party committee from *recommending* that primary voters nominate a particular candidate is to "suffocate" a party's right of association, then flatly to

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[12] Justice Stevens dissented in *Tashjian* on grounds unrelated to parties' rights of association.

prohibit the voters from nominating the candidate is to vaporize the right.

Arkansas' Amendment 73 provides that a congressional candidate who equals or exceeds the specified number of prior terms "shall not be eligible to have his/her name placed on the ballot for election."[13] The Amendment does not specify from which ballot(s) the candidate's name is excluded, but since certification as a candidate is also barred, the candidate apparently is excluded from the ballot in both primary and general elections.[14] Furthermore, write-in ballots are not counted in Arkansas primaries.[15] Thus, a term-limited party member who is fully qualified to be elected to Congress from Arkansas is flatly prohibited from

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13 Amendment 73, § 3(a) and (b).

14 Party nominees in Arkansas are certified as candidates by virtue of either winning or being unopposed in the party primary. *See* 6A Ark. Code of 1987 Annot. § 7-7-102(a) (1993).

An alternative interpretation might be suggested, namely that the term-limited candidate could appear on the *primary* ballot, and that if he or she won the primary or were unopposed, no candidate would be certified by the party as its nominee, and no congressional candidate would appear on the *general* election ballot under that party's label. However, this interpretation of Amendment 73 appears to be ruled out by other Arkansas statutory provisions. Under 6A Ark. Code of 1987 Annot. § 7-1-101(4) (1993), a "vacancy in nomination" occurs if the party selects a candidate at the primary who cannot be certified. Under 6A Ark. Code of 1987 Annot. § 7-7-104(a) (1993), this vacancy would be filled by alternate means, which, by virtue of Amendment 73, would have to mean by selection of someone other than the term-limited candidate. Accordingly, the most reasonable interpretation of Amendment 73 is that the term-limited candidate is completely banned from the primary election.

15 *Id.* at § 7-5-525(c).

associating with his or her party and its adherents by seeking the party's nomination at the primary; party members are flatly prohibited from associating with that candidate by voting for him or her in the primary; and the party as a whole is unable to nominate the candidate of its choice.

Suppose, for example, that Respondent Blanche Lambert, who represents the Arkansas 1st Congressional District, is reelected in 1994 and 1996 and chooses to run again in 1998. Unable to run in the Democratic primary, even as a write-in, her only recourse will be to run as a write-in candidate in the general election. Not only will she be deprived of the opportunity to associate with the Democratic Party as its candidate, but she will be forced to run against the candidate who received a majority in the Democratic primary. To give her a choice between waiving her right to run for Congress — which the ballot access term limit supposedly protects — and having to *oppose* the political party to which she adheres is an extreme and even perverse denial of her right of partisan political association.

Thus, in *Bullock v. Carter*, 405 U.S. 134 (1972), the state attempted to defend high filing fees for candidates who wished to run in party primaries on the ground that the candidates could avoid the filing fees by running as independents. This Court responded that "we can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations in order to avoid the burdens of the filing fees imposed by state law." 405 U.S. at 146-47. Amendment 73 goes even further by making the abandonment of party affiliation an absolute condition of running for Congress.

Party adherents and the party itself are equally stripped of their rights, beyond the basic deprivation of not being allowed to nominate the candidate of their choice. Amendment 73 turns the act of voting into a guessing game for adherents of the party in question — Democrats, in the example of Rep. Lambert. A Democratic voter who is indifferent as between Lambert and the Democrat whose name appears on the ballot, but who strongly prefers either Democrat to candidates of other parties, would have to guess which Democrat is likely to receive the most votes of other Democratic voters.

In *Tashjian* the Court noted that preventing *non*party members from voting in a party primary "deprives the Party and its members of the opportunity to inform themselves as to the level of support for the Party's candidates among a critical group of electors." 479 U.S. at 221. The Court thus recognized that one of the crucial benefits that parties and their adherents derive from primaries is the information primaries provide about the support for different candidates within the party. But the most vital information by far that is provided by the primary is the identification of a winner, i.e., the nomination of a candidate to represent the party in the general election. The primary thus serves as a coordinating device that enables voters who wish to support a given party to be confident that they can do so by voting for a given candidate. Amendment 73, by turning the general election into a guessing game for adherents of a party with a term-limited candidate who chooses to run as a write-in, undermines the coordinating function of the primary and thereby impairs the freedom of the party adherents to associate with one another effectively.

The problem for the party as a whole, of course, is that Amendment 73's conversion of the general election into a guessing game for voters threatens the party with electoral defeat despite the possibility that it enjoys majority support within the state or congressional district. The disaster that may confront a party whose voters are split between two candidates is certainly not theoretical. A famous historical example occurred in the 1912 presidential election, when the Progressive (or "Bull Moose") Party was formed by dissident Republicans who were opposed to the Republican incumbent, President Taft. The result was that Democrat Woodrow Wilson was elected with 42% of the popular vote, considerably less than the combined 51% received by the two Republicans, Roosevelt (27%) and Taft (24%).[16]

Of course, in a free society, parties have to take their chances that party splits will bring on electoral defeat, as happened to the Republicans in 1912. But parties also have the right to try to remain unified so as to avoid such splits. Amendment 73 deprives parties of that right by forcing division at *general* elections between the party nominee, who is listed as such on the ballot, and a write-in candidate, who by virtue of former primary and general election victories is almost certainly a credible claimant to party support. The state cannot impose ballot restrictions calculated to inflict serious, repeated disunity on political parties. Because Amendment 73 does exactly that, it violates the parties' freedom of

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16 *See* William H. Riker, *Liberalism Against Populism* 85-89 (1982) for a brief discussion of the 1912 election in the context of the electoral imperative of two unified parties that results from the American plurality-take-all electoral system. For a more extended theoretical discussion of this electoral imperative, *see* William H. Riker, "The Number of Political Parties: A Reexamination of Duverger's Law," 9 *Comparative Politics* 93 (1976).

association, in violation of the First and Fourteenth Amendments.[17]

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[17] In contrast to Arkansas, see note 16, *supra*, the California provisions may not absolutely exclude term-limited candidates from primaries. Arguably, such individuals may run as write-in candidates in primaries, and be "nominated" if they receive a plurality of votes. California Elections Code § 6610. California Elections Code § 25003 would prevent such a "nominee" from receiving a certificate of nomination under California Elections Code § 6617 and would prevent the candidate's name from appearing on the general election ballot. However, unlike Arkansas law, California Elections Code § 6655 permits only certain vacancies among a party's candidates to be filled by the parties for the general election, and these are limited to vacancies caused by death (California Elections Code § 6653) or by the candidate having been selected to fill another vacancy that is permitted to be filled (California Elections Code § 6651.5). These sections taken together might be interpreted to permit a term-limited candidate to run as a write-in in the primary, with the consequence that if he or she wins a plurality of votes, *no* candidate would appear under that party's label at the general election. The candidate could again campaign as a write-in at the general election, and would be elected if he or she received a plurality of votes.

If the California provisions are interpreted as suggested, they would be no more constitutional than the Arkansas provisions. First, the California provisions would still prevent the party and its adherents from nominating the candidate of their choice. The functional meaning of a party "nomination" under an electoral system that includes primaries and state-provided ballots, is that the party's nominee appears under the party label on the general election ballot. The state cannot avoid constitutional scrutiny by issuing a Pickwickian declaration that a candidate has been "nominated," when it denies to the candidate all the tangible incidents of nomination.

Second, it is true that the candidate would have a possible means of running in the general election without being forced to split his or her own party vote. But this benefit for the party is purchased at too steep a price. Voters favoring Rep. Berman in 1998, for example, would be forced at the primary either to vote for a less-favored

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III.

ARKANSAS AND OTHER STATES THAT HAVE ADOPTED BALLOT ACCESS TERM LIMITS IMPOSE A GRAVE HANDICAP ON QUALIFIED CONGRESSIONAL CANDIDATES FOR THE SOLE PURPOSE OF PREVENTING THEIR ELECTION. THIS INVIDIOUS DISCRIMINATION VIOLATES THE RIGHT OF SUPPORTERS OF THE HANDICAPPED CANDIDATES TO EQUAL PROTECTION.

Williams v. Rhodes, 393 U.S. 23 (1968), was the first of a series of cases in which this Court decided the constitutionality of petition requirements, filing fees, and other procedures governing ballot access for

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(fn. continued)
candidate or to vote to deny their own party a place on the ballot, with the consequence of greatly increasing the likelihood of a victory for an opposing party. This is a much greater interference with the freedom of parties and voters to nominate whatever candidates they please than was present in *Tashjian* or *Eu*. Furthermore, Rep. Berman might make the tactical judgment that he has a better chance of winning one write-in campaign than two, and therefore he might decline to run in the primary. In this event, the party and its voters would be faced with the same severe inroads on freedom of association as discussed in the text. Since the candidate's choice not to run in the primary would have been the direct result of the state's discriminatory ballot access restriction, the infringement of associational rights unquestionably would be the result of state action.

candidates and political parties.[18] As the Court stated in *Williams*, ballot access requirements burden two kinds of constitutional rights:

> The right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.

393 U.S. at 30.

There are various state interests that justify ballot access restrictions, but these most certainly do not include the state's desire to enhance the prospects of one party or candidate over another. Thus, in *Williams*, the Court rejected the state's proposed interest of promoting a two-party system, because in reality the state was playing favorites:

> The fact is, however, that the Ohio system does not merely favor a 'two-party system'; it favors two particular parties — the Republicans and the

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[18] *See also Jenness v. Fortson*, 403 U.S. 431 (1971); *Bullock v. Carter*, 405 U.S. 134 (1972); *Lubin v. Panish*, 415 U.S. 709 (1974); *Storer v. Brown*, 415 U.S 724 (1974); *American Party of Texas v. White*, 415 U.S. 767 (1974); *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

Clements v. Fashing, 457 U.S. 957 (1982), is often included in this series of cases and, indeed, the analysis in the opinions in that case draws heavily on the earlier cases in the series. However, unlike the other cases in the series and unlike Amendment 73 (as characterized of necessity by appellants), the provisions in *Clements* established actual disqualifications for office. The exclusion from the ballot in that case followed as a matter of course from that disqualification.

> Democrats — and in effect tends to give them a complete monopoly.

Id. at 32.

Amendment 73 denies ballot access to term-limited candidates for one reason and one reason only — to make it as difficult as possible for their supporters to succeed in electing them. Far from being a legitimate state interest that can be weighed against an infringement of constitutional rights, such state favoritism is sufficient in itself to condemn ballot access term limits to unconstitutionality.

Ballot access restrictions have been upheld to *facilitate* the ability of the majority of voters to elect their officials freely, not to manipulate election outcomes in the direction favored by the state. For example, in *Storer v. Brown*, 415 U.S. 724 (1974), a prohibition of independent candidacies by individuals who had recently been party members and thus could have sought nomination in a party primary was upheld. The prohibition furthered a legitimate state policy

> to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds.

415 U.S. at 735. As we have seen in Part II of this Argument, ballot access term limits undermine this policy and thereby frustrate the ability of a majority of voters to elect a candidate, by coercing members of the same party to oppose each other in the general election.

In other cases, the Court has upheld ballot access requirements reasonably designed to assure that only

serious parties and candidates with some modicum of electoral support will appear on the ballot. E.g., *American Party of Texas v. White*, 415 U.S. 767 (1974). As the Court explained in *Lubin v. Panish*, 415 U.S. 709, 715 (1974):

> That "laundry list" ballots discourage voter participation and confuse and frustrate those who do participate is too obvious to call for extended discussion. The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not.

It would be perverse to suggest that because the state may exclude candidates who lack voter support, it may also exclude candidates it fears will enjoy *too much* voter support. It is scarcely imaginable that this Court would rule that the state's desire to assure that certain candidates are defeated could provide a justification for denying ballot access. None of the ballot access decisions comes close to doing so. To the contrary, the touchstone in the ballot access cases has been that the will of the voters should prevail.

> The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance.

Lubin v. Panish, 415 U.S. at 716.

The unconstitutionality of Arkansas' resulted-oriented ballot exclusion is highlighted by the holdings of several courts. These holdings conclude that lack of neutrality in the relatively trivial matter of *ordering* the names of parties or candidates on the ballot is prohibited by the Equal Protection Clause. E.g., *McLain v. Meier*, 637 F.2d 1159, 1165-67 (8th Cir. 1980); *Sangmeister v. Woodard*, 565 F.2d 460 (7th Cir. 1977); *Gould v. Grubb*, 14 Cal.3d 661, 122 Cal.Rptr. 377, 536 P.2d 1337 (1975).[19] These decisions are based on the constitutional requirement that the state's ballot must be "neutral in character." *Sangmeister*, 565 F.2d at 468. As one court wrote in this context:

> The Fourteenth Amendment requires all candidates, newcomers and incumbents alike, to be treated equally.

Mann v. Powell, 333 F.Supp. 1261 (N.D.Ill. 1969). This statement is self-evidently true, and it is dispositive of the present case.

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[19] There are some decisions to the contrary, but their analysis does not lend support to Arkansas' ballot access term limits. For example, in *Clough v. Guzzi*, 416 F.Supp. 1057 (D.Mass. 1976), the listing of incumbents first was upheld, because strict scrutiny should be reserved for voting cases involving "more clear-cut and certain cases of inequality," *id.* at 1067, and because the listing of the incumbent first could be justified as an "informational device," making it clear to voters who was the candidate running for reelection. *Id.* at 1068. Excluding candidates altogether from the ballot is a "clear-cut and certain" case of inequality if ever there was one. Furthermore, to exclude a candidate from the ballot is to withhold information from the voters, not to provide it. *See also Ulland v. Growe*, 262 N.W.2d 412 (Minn. 1978), upholding the placing of independent candidates after party candidates, and relying on *Clough*.

The State of Arkansas claims that it may deny access to the ballot to selected candidates "to offset what are sometimes said to be insurmountable advantages held by incumbents in order to promote frequent rotation in office of elected officials. . . ." Pet. in No. 93-1828, at 22 n.32. With respect to its own officials, Arkansas can and does assure rotation in office by imposing absolute term limits. But Section 3 of Amendment 73 is based on the (accurate) premise that the qualifications for Congress are fixed by the Constitution. So long as term-limited individuals have the right to run for and be elected to Congress, voters supporting such individuals have the right to cast their votes free from palpable discrimination by the state.

Can the state avoid the charge of discrimination on the ground that it is simply offsetting "what are sometimes said to be insurmountable advantages held by incumbents"?[20] Certainly not, for several reasons.

First, the Arkansas attorney general declines to specify what those "insurmountable advantages" are. This is important, beyond the obvious point that fundamental First and Fourteenth Amendment rights cannot be overridden on the basis of such vague and unsubstantiated assertions.[21] The notion that the state may restrict rights in order to offset electoral advantages must

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[20] Neither Amendment 73 nor California Elections Code § 25003 limits its discrimination to incumbents. We shall put this point aside, however, because the interests and constitutional rights the California Amici seek to protect in this brief would be damaged even if the discrimination were limited to incumbents.

[21] The term "insurmountable" is plainly hyperbolic. For example, in 1992, nineteen incumbent members of the House were defeated in primaries alone, the highest number in the post-World War II period. *See Vital Statistics on American Politics* 206 (Table 7-5) (4th ed. 1994).

at least rest on the premise that the advantages in question are pathological. But this is a false premise for some of the advantages of incumbency. In particular, the greatest advantage for incumbents might be that constituents tend to reward them with votes for trying hard to do what the constituents want them to do. Since some portion of the "incumbency advantage" may thus reflect values as basic as democratic accountability, the mere desire to eliminate electoral advantage cannot justify infringing basic constitutional rights.

Insofar as some candidates are excluded from the ballot to offset such non-pathological advantages, the exclusion is plainly unconstitutional. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others," this Court has declared, "is wholly foreign to the First Amendment." *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). Surely it is at least as foreign to the Constitution to enhance the electoral prospects of some candidates for Congress by restricting access to the ballot for candidates the state fears may enjoy too much electoral support. The state has no business "handicapping" candidates. If voter preferences are predictable, whether on the basis of party or incumbency or ideology, the state has no legitimate interest in confounding those preferences by handicapping candidates.

Second, the state may respond that some of the "insurmountable advantages" enjoyed by incumbents *are* pathological and therefore deserve to be offset by exclusion from the ballot. The usual claim is that the "perquisites" of incumbent members of Congress give them an unfair advantage. Whether or not such perquisites are unfair, there is little or no evidence that they have a

significant electoral effect.[22] If there were such evidence and if the state had a sincere desire to offset "unfair" advantages, it could do so by nonrestrictive means, such as providing resources to assist all qualified candidates and parties in communicating with voters. But the reality is that ballot access term limits have neither the purpose nor the effect of "offsetting" electoral advantages. If they did, there would be an effort to calibrate the handicap to the advantage. Instead, by any plausible estimate, the handicap vastly exceeds the

[22] *See, e.g.*, Morris P. Fiorina, *Congress: Keystone of the Washington Establishment* 19-23 (1st ed. 1977); John C. McAdams & John R. Johannes, "Congressmen, Perquisites, and Elections," 50 *Journal of Politics* 412 (1988). One reason for skepticism is that the surge in congressional "perqs" occurred in the 1970's, *after* the surge in the incumbency vote advantage of the 1960's. *See* Gary C. Jacobson, *The Politics of Congressional Elections* 42 (1987); Glenn R. Parker, "Members of Congress and their Constituents: The Home-Style Connection," in *Congress Reconsidered* 171, 186-89 (Lawrence C. Dodd & Bruce I. Oppenheimer, eds., 4th ed. 1989). In the 1980's there was another surge in the incumbency vote advantage, while growth in perqs was declining. *See* Gary C. Jacobson, *The Electoral Origins of Divided Government: Competition in U.S. House Elections* 45 (1990).

Another supposedly "unfair" practice that is often blamed for the incumbency advantage is redistricting. *See, e.g.*, Lee Atwater, "Altered States: Redistricting Law and Politics in the 1990s," 6 *Journal of Law & Politics* 661 (1990). The empirical support for redistricting as a cause is even weaker than the support for perquisites. *See, e.g.*, Jacobson, *Electoral Origins*, *supra*, at 96; John A. Ferejohn, "On the Decline of Competition in Congressional Elections," 71 *American Political Science Review* 166, 167-68 (1977). In any event, Arkansas can hardly justify infringing constitutional rights as a necessary means of offsetting the effects of district lines for which it is responsible.

incumbency advantage.[23] The state's purpose in imposing ballot access term limits is to assure that any affected individual with the temerity to seek election to Congress is defeated. Talk of "offsetting advantages" is a sham.

Third, and most importantly, the state has no business regulating ballot access to influence the outcome of elections. All candidates enter the race with numerous advantages and disadvantages. Candidates may have an advantage because they are wealthy, or good looking, or well-known athletes, or shrewd political operators, or especially articulate, or descended from a well-known family, or possessed of stamina that permits them to walk door to door ten hours a day without tiring. Some

[23] Quantifying the incumbency electoral advantage is a more complex venture than might seem likely at first blush, but estimates by political scientists for the post-1960s period tend to fall between seven and ten percent. *See, e.g.*, James L. Payne, "The Personal Electoral Advantage of House Incumbents, 1936-1976," 8 *American Politics Quarterly* 465, 472 (1980) (7.2%); Andrew Gelman & Gary King, "Estimating Incumbency Advantage without Bias," 34 *American Journal of Political Science* 1142 (1990) (advantage oscillates around 10%, with considerable variance). It must be recalled that certainly not all and possibly almost none of the incumbency advantage is attributable to causes that can plausibly be regarded as unfair.

We know of no social scientific evidence quantifying the electoral disadvantage of being excluded from the ballot and forced to rely on write-in votes, but there can be little doubt that the disadvantage greatly exceeds ten percent, which forms the high-end estimate for the *total* electoral advantage of incumbency. The enormous electoral effect of exclusion from the ballot is the premise that underlies all of this Court's ballot access cases and was made explicit in *Lubin v. Panish*, 415 U.S. 709, 719 n.5 (1974): "The realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot."

of these advantages may be fair and others may be unfair. But under the American constitutional system, all the candidates who are qualified to hold the office they seek and who can demonstrate a modicum of electoral support are entitled to appear on the ballot. It is the people, not the state, who make the final decision.

CONCLUSION

The main focus of this litigation has been whether the ballot access term limits adopted in Arkansas are invalid by reason of the Qualifications Clauses of the Constitution. The purpose of this amicus brief has been to demonstrate that although the Qualifications Clauses may be sufficient to invalidate ballot access term limits, they are by no means necessary.

The general leeway that states have to set qualifications for office cannot blithely be extended to permit states to discriminate among candidates who possess the requisite qualifications. If Amendment 73 and its counterparts in other states are taken seriously as ballot access restrictions rather than as qualifications, then this brief has shown that they represent an extreme and entirely unprecedented invasion of the most basic democratic rights of parties, candidates, and voters.

It has been shown that ballot access term limits not only prohibit parties and party voters from nominating the candidates of their choice, but that such limits radically undermine the coordinating function served by primary elections, thereby imposing on parties serious and systematically repeated schisms. It has also been shown that ballot access term limits represent the first time — and one may hope the last time — that this Court has been confronted with ballot exclusions adopted

expressly for the purpose of "handicapping" qualified candidates that the state believes should not be elected.

Although it may be unnecessary for the Court to reach the question, it would be a grave mistake for the Court to regard the First and Fourteenth Amendments as make-weights in this case. Amendment 73 is unconstitutional.

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Respectfully submitted,

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APPENDIX A

CALIFORNIA ELECTIONS CODE § 25003

§ 25003. Limitation on ballot access

(a) Federal legislative candidates; ballot access. Notwithstanding any other provision of law, the Secretary of State, or other election official authorized by law, shall not accept or verify the signatures on any nomination paper for any person, nor shall he or she certify or place on the list of certified candidates, nor print or cause to be printed on any ballot, ballot pamphlet, sample ballot, or ballot label the name of any person, who does either of the following:

(1) Seeks to become a candidate for a seat in the United States House of Representatives, and who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the United States House of Representatives representing any portion or district of the State of California during six or more of the previous eleven years;

(2) Seeks to become a candidate for a seat in the United States Senate, and who, by the end of the then current term of office will have served, or but for resignation would have served, as a member of the United States Senate representing the State of California during twelve or more of the previous seventeen years.

(b) "Write-in" candidacies. Nothing in this section shall be construed as preventing or prohibiting any qualified voter of this state from casting a ballot for any person by writing the name of that person on the ballot, or from having such a ballot counted or tabulated, nor shall any provision of this section be construed as preventing or prohibiting any person from standing or campaigning for any elective office by means of a "write-in" campaign.

(c) Construction. Nothing in this section shall be construed as preventing or prohibiting the name of any person form appearing on the ballot at any direct primary or general election unless that person is specifically prohibited from doing so by the provisions of subdivision (a), and to that end the provisions of subdivision (a) shall be strictly construed.

(Added by Initiative Measure (Prop. 164, approved Nov. 3, 1992, eff. Jan. 1, 1993).)

APPENDIX B

OPEN CANDIDATES STATUS

WHEREAS, the California Democratic Party and its members — registered Democrats in the State of California — are determined to protect their right in primary elections to freely nominate any candidate of their choice who is a Democrat and who meets the legal qualifications for the office in question; and

WHEREAS, Propositions 140 and 164 purport to preclude the California Secretary of State from accepting the candidacy papers for both houses of Congress and the State Legislature based on previous service of specified length in the respective offices; and

WHEREAS, Proposition 164 would seriously impair the right of registered California Democrats independently to evaluate the qualifications of all candidates and to nominate the candidate of their choice;

THEREFORE BE IT RESOLVED, that the California Democratic Party primary elections for the offices of United States Representative and United States Senator are open to any candidate who meets the valid legal qualifications for these offices and who has been a registered member of the Democratic Party for the time period selected in the primary election shall be the Democratic Party's candidate on the general election ballot without discrimination on the basis of past service in office;

AND BE IT FURTHER RESOLVED, that the California Democratic Party asserts its right and desire to nominate candidates for the California State Legislature without discrimination on the basis of past service in office.